In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 427

FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE, APPELLANT

v.

STATE OF NEW YORK

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This appeal presents the question of the constitutionality, as applied to national banks, of that portion of Section 258(1) of the New York Banking Law which prohibits the use, except by a savings bank or a savings and loan association, of the words "saving" or "savings" or their equivalent in the advertising and conduct of banking or financial business. The Court of Appeals of New York, with two judges dissenting, has upheld the validity

of this prohibition of the State statute, expressly holding that it does not contravene R. S. 5136 (12 U. S. C. 24), when read in conjunction with Section 24 of the Federal Reserve Act (38 Stat. 273, as amended, 12 U. S. C. 371). The latter section authorizes national banks "to receive time and savings deposits," while the former confers upon national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." This determination of the court below is contrary to the long standing administrative position taken both by the Bureau of the Comptroller of the Currency and by the Board of Governors of the Federal Reserve System and is patently erroneous. If allowed to stand, it will have a substantial and detrimental effect upon the national banking system as a whole. Accordingly, it is submitted that probable jurisdiction should be noted.[1]

1. It is well settled that "it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government." *Easton* v. *Iowa*, 188 U. S. 220, 238. Cf. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283. Section 258(1) of the New York Banking Law, by prohibiting national banks from using the term "saving" or "savings" in their advertising, plainly offends in this regard.

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[1] In the event that probable jurisdiction is noted, the United States intends to file a brief as *amicus curiae*, urging that the judgment below be reversed.

Congress has granted to national banks the power to receive savings deposits (12 U. S. C. 371) and has additionally granted to them the exercise of the incidental powers necessary to carry on their banking activities (12 U. S. C. 24). Realistically viewed, it can hardly be disputed that the power to advertise is an incidental power necessary to the successful conduct of the business of banking, as well as any other business. Cf. *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 315. And the power to advertise perforce includes the power accurately and adequately to describe the product or service offered. Effective solicitation is difficult, if not impossible, in circumstances where the product or service must be described in such a way as to disguise it or to deceive the public as to its true nature.[2]

These considerations suggest an additional reason why the New York statute, as applied by the court below, is invalid. It is clear that no state may discriminate against national banks in favor of state banking institutions. See, *e.g.*, *Burnes National Bank* v. *Duncan*, 265 U. S. 17; *First National*

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[2] The majority of the court below justified the application of Section 258(1) to national banks in part on the ground that the section has a reasonable purpose—namely, the protection of the public from misleading advertising. But the section seemingly has quite the opposite effect, since it forces national banks to resort to deceptive verbiage in the solicitation of savings deposits, a practice which the majority of the court below apparently approved. 113 N.E. 2d at 799. Moreover, as the dissent below observed, it is strange indeed to characterize as deceptive or harmful advertising by a national bank which employs the very language of the act authorizing it to receive "savings deposits."

Bank v. *Fellows*, 244 U. S. 416. This follows from the obvious fact that if such discrimination were tolerated a state could, as a practical matter, prevent the operation of national banks within its jurisdiction. As the court below conceded, national banks and state savings banks compete with each other in so far as savings deposits are concerned. Consequently, by permitting savings banks, but not national banks, to use the words "saving" or "savings" in their advertising, Section 258(1) gives the former a substantial competitive advantage over the latter.

2. The importance of the question transcends the effect of the decision below upon national banks located within the bounds of New York. Other jurisdictions have statutes which, construed literally, prohibit the use of particular words (including in some instances the word "bank") in the title and advertising of a national bank.[3] It has heretofore been the view of the federal banking supervisory agencies, and presumably that of the state authorities, that such statutes are not applicable to national banks.[4] The decision of the court below

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[3] See, *e.g.*, Cal. Financial Code Ann. (Deering 1951) §§ 3390-3395; Me. Rev. Stat., c. 55, § 5 (1944); Mass. Ann. Laws, c. 167, § 12, c. 172, § 4 (1948); Minn. Stat. Ann. §§ 47.03, 47.23 (1946); Mont. Rev. Code Ann. § 5-508 (1947); N.J. Stat. Ann. § 17:9A-18 (1950); N. C. Gen. Stat. § 53-127 (1950); N.D. Rev. Code § 6-0409 (1943); Ore Comp. Laws Ann. § 40-401 (1940); S.D. Code § 6-0504 (1939).

[4] The administrative position of the Bureau of the Comptroller of the Currency in respect to the New York statute and the similar California statute is set forth in appellant's Statement as to Jurisdiction. We are advised by the Secretary of the Treasury that the Bureau has adopted the same view as to all state enactments of this nature. And, in so far as the

encourages attempts in the future to require national banks to eliminate the proscribed terms from their titles or advertising. Furthermore, it is equally probable that the decision will be used as the basis for further legislation exercising control over national banks and, by design or otherwise, affording a competitive advantage to state banking institutions.

For these reasons it is respectfully submitted that probable jurisdiction should be noted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER 1953.

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state authorities are concerned, we have discovered only one prior instance where an attempt was made to apply such a statute to a national bank. The attempt proved unsuccessful. *Fidelity National Bank and Trust Co.* v. *Enright*, 264 Fed. 236 (W.D. Mo.).

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